THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA 01/09/2014

CASE NUMBER A39/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

1/9/2014 .....
DATE SIGNATURE

MANDLA SIBEKO — APPELLANT

AND

THE STATE — RESPONDENT

JUDGEMENT

MODIBA AJ:

1. This is an appeal against the conviction and sentence by the Regional Magistrate Mr P R Seshai sitting at the Regional Court for the Division of Mpumalanga held at Mkobola on 25 January 2010.
2. The Appellant was convicted of one count of rape and one count of assault with intent to do grievous bodily harm. The two counts were taken together for the purpose of sentencing. The appellant was sentenced to 20 years imprisonment and declared unfit to possess a fire arm in terms of section 103 (1) of Act 60 of 2000.
3. This is one of the many sexual offence cases involving children that come before our courts, reflecting gross inefficiencies in the criminal justice system. In the week my brother Judge Bertelsmann and I heard this appeal, we heard several cases which were inefficiently managed by the police, the medico-legal officials, prosecutors and

the accused's legal representatives. To make matters worse, the presiding officer spared his rebuke and failed to address or correct some of the inefficiencies that he could have addressed.

4. The complainant in this appeal was 14 years old when the sexual incident occurred on 20 December 2005. The following day, she reported the incident to the police with the assistance of her aunt and underwent a medico-legal examination. The appellant was arrested almost immediately. The charge sheet reflects 22 December 2005 as his date of arrest. Nothing in the docket suggests that other state witnesses were not readily available. The two other state witnesses are members of the complainant's family. They shared the same household with the complainant. Yet the case was only finalised on 25 January 2010 after 25 court appearances. Most of the postponements were occasioned by the defence. The appellant changed legal representatives 3 times. As a result, the complainant's cross examination took more than 12 months to complete. At some point during the various remands, the state witnesses indicated that they were tired of coming to court.
5. The police took two statements from the complainant, one when the case was reported and the second one on 16 January 2006. It is not clear from the record why there was a need to take a full second statement from the complainant. At best, if the first statement omitted material facts, only a supplementary statement should have been taken. The two statements contain contradictions. The complainant testified that after the statements were taken, they were not read back to her and consequently, she did not confirm the correctness of their contents. A trial within a trial was not held to determine the circumstances under which the statement was taken. The police officer who took the statement was also not called to testify.
6. The 14 year old complainant testified in open court facing the accused. In fact she had to face the accused in court for several years when the matter was repeatedly remanded after it had been set down for trial. Contrary to the NDPP policy directives, the services of an intermediary were not utilized. Neither the Regional Magistrate nor the prosecutor placed any explanation on record for this failure to investigate whether the child witness was in need of this protection. The Constitutional Court emphasized the need to protect children against abuse of a sexual nature in ***Bothma v Els & Others 2010 (2) SA 622 (CC); (2010 (1) SACR 184 (CC); 2010 BCLR 1 (CC)); see also DPP, Transvaal v Minister of Justice & Constitutional Development & Others 2009 (4) SA 222 cc (2000 (7) BCLR 637; 2009 (2) SACR 139) and S v Mbokhani 2009 (1) SACR 533 (T).***
7. Research has shown that such inefficiencies contribute to the victimization of child complainants in sexual offence cases. The Criminal Law (Sexual Offences and

Related Matters) Amendment Act 32 of 2007 was enacted to, amongst other reasons, eliminate such inefficiencies. It is unacceptable that more than 7 years after the Act was enacted, it remains poorly implemented and that child complainants continue to be exposed to systemic victimization. The criminal justice system is their last hope for any vindication that they might obtain after being exposed to a gross violation of their dignity and childhood. It is about time that these inefficiencies are eliminated, failing which the integrity of our justice system will continue to be jeopardized

8. It is common cause that on the evening of 20 December 2005, the complainant was with the appellant at his homestead in Tweefontein K. Sexual intercourse took place between the appellant and the complainant. At some point during the same evening prior to having sexual intercourse with the complainant, the appellant assaulted her. As a result, she sustained extensive bruising on her face and bled through her left ear.
9. During the trial, the appellant disputed that he had sexual intercourse with the complainant without her consent. It was submitted on his behalf that if found that the complainant consented, then the appellant did not and could not have known that she lacked the capacity to consent due to her age. In the version that was put to the complainant during cross examination he also disputed that he assaulted the complainant. However, he changed his version when he testified. He admitted assaulting the complainant and offered an explanation for his conduct.
10. The complainant's evidence was not mechanically recorded during the trial and had to be reconstructed after the appellant applied for leave to appeal. According to the reconstructed record, the complainant testified that on the day in question, while walking with her cousin, they were approached by the appellant who, after greeting them by hand, grabbed her hand and dragged her towards his car. Two other boys acquainted to the complainant tried to assist her. The appellant kicked one of them on the chest, put the complainant in his motor vehicle and drove off. During the night they visited several taverns. Later on that evening, the appellant drove her to his home where he had sexual intercourse with her without her consent. In the morning, the appellant drove the complainant to her aunt's home.
11. The Complainant's cousin testified that she was with the complainant when the appellant kidnapped her. Thereafter she reported the incident to her mother who is the complainant's aunt, as well as the complainant's grandmother who immediately went looking for the complainant without success.
12. The nurse who conducted the medical examination on the complainant after the incident was also called to testify. She testified that she observed a bruise and

swelling on the left side of the complainant's face. She also observed dry blood from her left ear. Her hymen was perforated at the 8 o'clock position. This type of perforation is consistent with being sexually penetrated for the first time. However the tear could have occurred in any position. A complainant does not sustain a tear during subsequent sexual penetrations. Notably, the nurse was not requested by the prosecution or the Magistrate to express an opinion on whether based on this medical evidence, the complainant was forcefully penetrated or not. The complainant is reported to have been calm and stable during the examination.

13. The complainant's aunt corroborated the complainant's cousin's evidence that she reported to her that the complainant had been kidnapped. She then went to the appellant's mother requesting her to call the appellant and inform him to bring the complainant back. Later on she personally spoke to the appellant on the phone. The appellant informed her that the complainant was safe with him. He would not let her speak to the complainant at that stage. She sought help from the police but was informed that there were no police vans. They took the accused's address and undertook to go and look for him. She waited for a report back from the police to no avail. She called the appellant again later that evening and asked him if he could speak to the complainant. He gave the complainant the phone but she was crying and did not speak. She told the appellant to return the complainant but he dropped the phone. She called the complainant again at 5am the following day. The complainant was crying. She did not report the rape to her at that stage. The appellant returned the complainant to aunt's home at 7:30am. He asked for forgiveness and handed R300 to the complainant's aunt with a promise to bring another R1, 000. At that point, she decided to take the complainant to the police without questioning her further about the events of the previous night because, when she tried to find out from the complainant what happened to her, she broke down and cried.
14. The appellant pleaded not guilty. He made an admission in terms of section 220 that he had consensual sexual intercourse with the complainant on the night in question.
15. The appellant testified that on the day in question, he saw the complainant not far from her home and proposed love to her. The complainant told him to return later. He met with the complainant later as arranged. The complainant was in the company of her cousin. The complainant then left with the appellant to a tavern where they consumed alcohol together with the appellant's friend, whom they had met on the way. They visited two other taverns that night. At one of the taverns, the complainant chose to remain in the car. At some point that evening the complainant's aunt spoke to her on the phone. She informed her that she was with the appellant and that all

was well. Later on the complainant told him that she was too scared to go home because she was drunk. She asked the appellant to take her home with him. They drove to the appellant's home where the appellant resided with his family. Other family members were present at the time. At some point the appellant left the complainant alone in his room and returned to find her deleting other girl's messages. He then slapped her. They later made peace and had sexual intercourse. The appellant denied giving money to the complainant's aunt when he took the complainant home the following morning.

16. Counsel for the appellant pointed out several contradictions between the evidence of state witnesses as well as contradictions between the complainant's evidence. He argued that this evidence weakens the state's case. He also submitted that the court ought to accept his client's evidence that the complainant went into his car voluntarily and stayed with him throughout the night. She had sufficient opportunity during that night to get away but did not do so. He submitted that because the appellant did not scream when the appellant had sex with her, it can only mean that she had consented. Had she screamed, the other family members were present and would have assisted her. That she did not scream is consistent with the appellant's version that she went to his home of her own volition and consented to have sexual intercourse with him.
17. Counsel for the state submitted that the court a quo correctly rejected the appellant's evidence as untruthful. In his plea explanation, the appellant denied assaulting the complainant. However, when he testified, he changed his version. He testified that the complainant fought with women at the tavern accusing them of having liaisons with him. He enjoined the court to draw an adverse inference from the fact that the appellant changed his version after hearing the evidence of the complainant and the nurse concerning the appellant's injuries. In my view, in the light of the appellant's changed version, the trial court correctly rejected his evidence as not being reasonably possibly true.
18. I have noted the defence submissions regarding the contradictions in the states case. However, I am of the view that given that the complainant was not given an opportunity to confirm the two statements after they were taken, the contradictions in question do not have much gravity. There was a long time lapse between the commission of the offence and the time the state witnesses eventually testified in court. The complainant was only 14 years old when the incident occurred. She only had an opportunity to testify a few years after the incident and was cross examined for over 12 months. In the circumstances, it is not surprising that the complaints memory of details of the event to be affected. The contradictions relate in the main

to events that took place earlier in the day of the incident and not to the actual sexual incident.

19. In my view, although in criminal cases the court is required to have regard to the totality of the evidence, as far as the charges in this case are concerned, the events that took place in the appellant's bedroom on the day in question are of utmost importance. So is the medical evidence of grievous bodily harm to the complainant and the medical corroboration that it was her first sexual encounter. Therefore the trial court correctly did not put considerable weight on the contradictions in the state's case.
20. I have also noted the defence submission regarding failure by the complainant to use the opportunities she had to run away from the appellant. From the reconstructed record of her evidence, it does not seem that she was asked why she did not escape. There could be many reasons why the complainant did not use the opportunities she had to escape that night. She was possibly scared to expose herself to further attack by other assailants. She could have trusted that the appellant would take her home that night. She testified that when the appellant was driving to his home that evening, she asked him to take her to her home and he ignored her. In my view, in the circumstances of this case, failure to use whatever opportunities she had to escape can never equate to consenting to sexual intercourse.
21. I find the objective evidence of the grievous assault afflicted on the complainant by the appellant shortly before he had sex with her that night disturbing. The appellant was a 30 year old man in 2005. The complainant was only 14 years old. She did not scream while being grievously assaulted. This indicates that she was petrified of the appellant. She testified that after assaulting her, the appellant overpowered her and raped her. I do not see how as alleged by the appellant, after being assaulted the way she was, the complainant can freely and voluntarily consent to sexual intercourse, especially considering that she was having sexual intercourse for the first time. The appellant's version that he assaulted her because he found her deleting other messages from his phone was clearly an afterthought. This is not the version he gave in his plea explanation.
22. In my view, the Magistrate correctly found that the complainant did not consent to have sexual intercourse with the appellant on the night of 20 December 2005. The allegation that he was under the impression that the complainant was of consenting age is therefore irrelevant, although it should be added that it is unlikely to be true. The complainant testified that she was much smaller when the incident occurred then when she testified. The J88 form indicates that her tanner stage development for

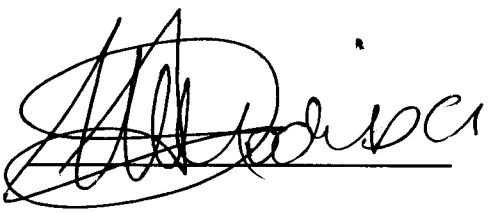
pubic her and breast was 3. The appellant could therefore not have been mistaken about her age.

23. I am of the further view that there is no reason to interfere with the 20 years imprisonment sentence of 20 years imposed by the Magistrate. As submitted on behalf of the state, he considered all the relevant factors in line with the decisions in S v Chapman 1997 (3) SA 341 SCA and S v SMM 2013 (2) SACR 292 SCA at 299 and found that there are substantial and compelling circumstances that justify departing from the prescribed minimum sentence.
24. The Magistrate failed to give an order that the appellant's particulars included in the register of sexual offenders in terms of section 50(2) (a) of Act 32 of 2007. It is appropriate that I make that order.

ORDER

In the premises, I make the following order:

1. The appeal against conviction and sentence is dismissed.
2. The convictions on the count of rape and the count of assault with the intent to do grievous bodily harm are confirmed.
3. The 20 years imprisonment sentence is confirmed.
4. The declaration that the appellant is unfit to possess a fire arm is confirmed.
5. The appellant's particulars must be included in the register of sexual offenders in terms of section 50(2) (a) of Act 32 of 2007.



MODIBA AJ

I agree and it is so ordered

BERTELSMANN J

ATTORNEY FOR THE APPELANT — Mr H Mushwana

Has the right of appearance in the High Court
In terms of section 4 Act 62 of 1995

COUNSEL FOR THE STATE — Mr GJC Maritz

Date of hearing: 15 August 2014

Date of judgement: 1 September 2014